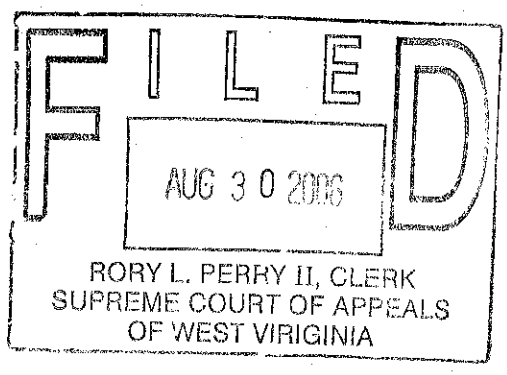
WEST VIRGINIA SUPREME COURT OF APPEALS

NO. 33102



JOHN BARBINA, individually
and as parent of ANISSA BARBINA,
an infant,

Appellants,

v.

CHARLES CURRY,
KELLEY A. CURRY,
THE WEST VIRGINIA DEPARTMENT
OF HEALTH AND HUMAN RESOURCES,
LORI GLOVER, and CLARK SINCLAIR, as
Sheriff of Taylor County, West Virginia, and
VALLEY COMPREHENSIVE COMMUNITY
MENTAL HEALTH CENTER, INC.,

Respondents.

BRIEF OF APPELLEE THE WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES

Elisabeth H. Rose
Counsel for Appellee
The West Virginia Department
of Health and Human Resources
West Virginia State Bar ID Number 3178
612 WesBanco Building
Post Office Box 1307
Fairmont, West Virginia 26555-1307
(304) 363-4260
(304) 363-4284 (Facsimile)

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INTRODUCTORY STATEMENT

The summary judgment awarded to the West Virginia Department of Health and Human Resources (DHHR) by the Circuit Court of Taylor County, West Virginia, on the bases of the Public Duty Doctrine and the case of Arbaugh v. Board of Education of Pendleton County, 591 S.E.2d 235 (W.Va. 2003) should not be reversed. The Circuit Court of Taylor County, West Virginia, correctly applied the appropriate analyses and standard to the claims lodged against the DHHR and fairly and properly concluded that no genuine issue of material fact existed as to it within the context of those claims.

RESPONSE TO APPELLANTS' STATEMENT OF FACTS

The DHHR does not identify any relevant misstatement among the Appellants' recitation of facts, other than the Appellants' continuing interpretation of the scope of the action taken by the DHHR after February 7, 2000 (the date on which the appellant John Barbina reported to the DHHR's office in Taylor County, West Virginia, that Charles Curry had allegedly sexually assaulted and/or abused his daughter, Anissa Barbina. In the Appellants' statement of facts, they say: "The DHHR took the position through Lori Glover's deposition that they did not have to do anything [pursuant to John Barbina's report on February 7, 2000], since Charles Curry did not live in the same residence as Anissa Barbina. However, the WVDHHR would give the CPS report the same status as an out-of-state or out of county referral by doing a "courtesy interview." " The Appellants have reiterated this characterization of the scope of the DHHR's responsibilities throughout this case, including in their petition and brief. While the DHHR does not deem this matter relevant to the issues framed by the Appellants for appeal (for reasons which will be set forth below), the DHHR nonetheless believes

it is critical to provide an accurate explanation of the DHHR's responsibility after February 7, 2000.

When reports of abuse are made to the DHHR, the DHHR differentiates between reports of abuse alleged to have occurred at the hands of a family member and those alleged to have occurred at the hands of a third-party out-of-home perpetrator (deposition of Cathy King, Program Coordinator for Child Protective Services, Department of Health and Human Resources, given on April 2, 2002; page 48, lines 17-25 and page 50, lines 1-15).[1] The DHHR is not a law enforcement agency, and it does not have jurisdiction over perpetrators that are outside the family (King deposition, page 62, Lines 16-25; page 63, lines 1-11). The DHHR does not do a full initial assessment and safety evaluation unless there are allegations that a parent is negligent in some way (King deposition, page 66, lines 16-25; page 68, lines 1-4). In this case, a full initial assessment and safety evaluation were not performed (Cathy King deposition, page 68, lines 8-10). The "referral" made by John Barbina on February 7, 2000, was not considered a true referral because it involved alleged sexual abuse by a third-party individual who was an out-of-home perpetrator (deposition of Lori A. Glover, former DHHR Child Protective Services worker, given on February 26, 2002; page 8, lines 16-18). The way this case was handled differed a great deal from a regular CPS (Child Protective Services) referral (Glover deposition, page 24, lines 4-7). In a case such as this, the CPS worker makes contact with the victim, obtains a courtesy interview for the investigating officer, notifies the parent that the statement has been taken, offers suggestions on services and turns all of the information over to the appropriate law enforcement agency (Glover deposition, page 24, lines 9-13).

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[1]Copies of cited deposition pages are attached as Exhibits hereto, inasmuch as these depositions have not been made a part of the record.

In the case of an alleged third-party out-of-home perpetrator, the DHHR interviews the victim child as a courtesy to law enforcement. That is really the extent of the DHHR's involvement. It then becomes a criminal matter (Glover deposition, page 47, lines 9-11).

In Taylor County, the DHHR contracts with an agency called Together in Recovery (Glover deposition, page 48, lines 1-4). Lori Glover referred this case to Together in Recovery, and that agency linked up with the family to provide counseling and other services (Glover deposition, page 57, lines 17-20). Once a courtesy interview was completed and given to the police, DHHR's official duties terminated (although the cases involving out-of-home perpetrators were brought up at investigative Multidisciplinary Team meetings held pursuant to Chapter 49, Article 5D, Section 2 of the West Virginia Code) (Glover deposition, page 60, lines 24-25; page 61, lines 1-2).

DHHR offers this explanation of its responsibilities under the circumstances of this case to provide an accurate context and perspective to the Appellants' arguments concerning alleged acts and omissions on the part of the DHHR subsequent to February, 2000.

ARGUMENT

The Appellants attack the granting of summary judgment in favor of the DHHR by the Circuit Court of Taylor County, West Virginia, and urge that this Honorable Court reverse the same for two reasons: (1) the Circuit Court of Taylor County, West Virginia, erred in declining to find a "special relationship" between the Appellants and the DHHR, the existence of which would deprive the DHHR of the exemption from liability afforded by the Public Duty Doctrine; and (2) the Circuit Court of Taylor County, West Virginia, erred in applying this Court's holding in the case of Arbaugh v. Board of Education, 591 S.E.2d 235 (W.Va. 2003). The Appellants can sustain neither of these

arguments, and the summary judgment entered in favor of the DHHR should be affirmed.

The Circuit Court of Taylor County, West Virginia, Appropriately Applied the Public Duty Doctrine to the DHHR and Correctly Concluded that No Special Relationship to that Doctrine Existed Under the Facts of This Case

The Appellants do not assign any error (in their petition or brief) to the Circuit Court's application of the Public Duty Doctrine to the DHHR. The Appellants' assignment of error goes to the Circuit Court's failure to agree with the Appellants that the "special relationship" exception to the Public Duty Doctrine should have been invoked, eliminating the exemption from liability afforded by the Doctrine.

The Public Duty Doctrine provides that a local governmental entity's liability may not be predicated upon the breach of a general duty owed to the public as a whole; instead, only the breach of a duty owed to the particular person injured is actionable. Benson v. Kutsch, 380 S.E.2d 36 (W.Va. 1989); Parkulo v. West Virginia Board of Probation, 483 S.E.2d 507 (W.Va. 1996); and Holsten v. Massey, 490 S.E.2d 864 (W.Va. 1997).

Through case law, a "special relationship" exception to the Public Duty Doctrine has been created, giving rise to a cause of action in certain situations (and avoiding the exemption from liability created by the doctrine) when there is a special relationship between an individual and a governmental entity (Benson, Parkulo, and Holsten, *supra*).

To establish that a special relationship exists between a local governmental entity and an individual, the following elements must be shown: (1) an assumption by the local governmental entity, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the local governmental entity's agents that inaction could lead to harm; (3) some form of direct contact between the local governmental entity's agents and the

injured party; and (4) that party's justifiable reliance on the local governmental entity's affirmative undertaking. Walker v. Meadows, 521 S.E.2d 801 (W.Va. 1999); and Wolfe v. City of Wheeling, 387 S.E.2d 307 (W.Va. 1989).

Several dates are critical milestones in this case. First, September 17, 1998, is the date on which Anissa Barbina reported her alleged abuse to Valley Comprehensive Community Mental Health Center (Valley). Second, Thanksgiving Day of 1999 was the date on which Anissa Barbina was "French kissed" by her grandfather. Third, February 6, 2000, was the date on which Anissa first revealed to her father the events which she reported to Valley on September 17, 1998, and the event which occurred on Thanksgiving Day of 1999. Finally, February 7, 2000, was the date on which John Barbina notified the DHHR of the alleged abuse.

By Order entered in the Circuit Court of Taylor County, West Virginia, on January 20, 2005 (Record, pages 456-458), partial summary judgment was granted to the DHHR. The lower court found that the DHHR did not proximately cause or contribute to the incident or incidents of sexual assault and/or abuse to which Anissa Barbina allegedly was subjected prior to September 17, 1998; that the DHHR had no knowledge or reason to know of the incident or incidents of sexual assault and/or abuse to which Anissa Barbina allegedly was subjected prior to September 17, 1998; that the incident or incidents of sexual assault and/or abuse to which Anissa Barbina allegedly was subjected prior to September 17, 1998, cannot be relied upon by the Appellants as the basis of any claim or damages against the DHHR; and that the Appellants are not entitled to claim or recover any damages against the DHHR for any incident or incidents of sexual abuse and/or assault to which Anissa Barbina was subjected to prior to September 17, 1998. This Order (which is not assigned as error on the Appellants' brief) eliminates the need to look at any time period prior to September 17, 1998,

in determining the sustainability of the lower court's summary judgment.

The lower court, in its July 12, 2005, order (Record, pages 602-609) (which granted summary judgment on all matters not addressed in the January 20, 2005, order) held that two elements necessary to the establishment of the special relationship exception to the Public Duty Doctrine did not exist as to the DHHR: (1) the DHHR did not assume an affirmative duty, by promises or actions, to act on behalf of Anissa Barbina, as a result of a referral by Valley concerning Anissa Barbina made on September 18, 1998; and (2) no form of direct contact between the agents of the DHHR and Anissa Barbina or John Barbina took place as a result of the referral by Valley concerning Anissa Barbina on September 18, 1998.

In the Appellants' petition, they offered no argument whatsoever that a special relationship exception to the Public Duty Doctrine was created by any direct contact between the DHHR and the Appellants prior to February 7, 2000, or that the DHHR assumed an affirmative duty, by promises or actions, to act on behalf of Anissa Barbina prior to February 7, 2000. Now, the Appellants purport to add these ingredients to their appellate brief by suggesting (on page 25) that the DHHR's first contact with the Appellants was on September 18, 1998, when Valley made a referral to the DHHR pursuant to Anissa Barbina's revelation to Valley on September 17, 1998, that her grandfather had sexually abused her. The DHHR protests that the Appellants have waived their right to continue with this argument as a result of their failure to preserve it by insertion in their petition. This protest notwithstanding, the alleged September 18, 1998, contact does not establish any of the elements required to prove a special relationship exception to the Public Duty Doctrine.

The lower court found, as to the alleged September 18, 1998, contact, that the DHHR employee assigned to intake duties with the DHHR on the relevant date (Bonnie Nelson) had no

recollection of receiving a report on Anissa Barbina from Valley; that a supervisor of Child Protective Services of the DHHR oversaw an internal investigation on the issue of whether a referral concerning Anissa Barbina from Valley Mental Health was made on September 18, 1998, and determined that no records of any such referral were discovered; that no DHHR records exist of a referral by Valley concerning Anissa Barbina on September 18, 1998; that DHHR took no action based on a referral by Valley concerning Anissa Barbina made on September 18, 1998; and that no communication took place between the DHHR and Anissa Barbina or John Barbina as a result of a referral by Valley Mental Health made on September 18, 1998 (July 12, 2005, Order, Record Pages 602-609). The lower court, in the same Order, concluded as a matter of law that because the referral by Valley did not make it to the DHHR, the DHHR did not assume any affirmative duty to act on behalf of Anissa Barbina; that no form of direct contact between the DHHR and Anissa or John Barbina took place; and that no special relationship was created as of September 18, 1998. Based upon these conclusions, the Court found that the claims asserted by the Appellants constituted an alleged breach of a general duty to the public as a whole as opposed to a breach of a duty owed to Anissa Barbina.

The Appellants fail to raise any legitimate argument to contradict the appropriateness of the lower court's conclusion that no special relationship was created between the DHHR and the Appellants. The Appellants resort to the suggestion that if the referral had been appropriately recorded by the DHHR, the other elements of the special relationship would exist. The lower court noted in its July 12, 2005, Order that while the Appellants presented some evidence that Valley attempted to make a referral to the DHHR in September, 1998, they offered no evidence that the report from Valley on or about September 18, 1998, was ever received for proper processing by the

DHHR. The Court stated: "Plaintiffs have not submitted, or presented any evidence that a call by Valley Mental Health concerning Anissa Barbina on or about September 18, 1998, ever made its way past the initial intake worker, Bonnie Nelson, into the proper channel or system required for initiation of an investigation. In other words, assuming Valley made a referral call to WVDHHR (CPS) on or about September 18, 1998, no evidence has been presented that Bonnie Nelson ever inputted that information into the Defendant's reporting system or ever forwarded the information to the appropriate individuals at CPS."

Logic overtakes the Appellants' argument that there was any form of direct contact between DHHR and the Appellants. The Appellants are accusing the DHHR of failing to effect the intake of Valley's referral concerning Anissa Barbina in September, 1998, because either the DHHR's intake system was faulty or the DHHR employees responsible for intake of referrals did not perform adequately. In either event, the Appellants are generally complaining about the way the DHHR operated in September, 1998, as far as the intake of referrals was concerned. Such a complaint (taken as true only for the sake of this argument) implies a breach of duty to the general public and not to any particular person.

The Appellants' failure to adduce any evidence that the Valley referral made it to or through DHHR's intake system destroys at least two essential elements of the special relationship exception to the Public Duty Doctrine: an assumption by DHHR, through promises or actions, of an affirmative duty to act on behalf of Anissa Barbina; and any form of direct contact between DHHR and Anissa Barbina.[2] Contact between the DHHR and Anissa Barbina was never established because the referral

[2]Reason dictates that if the DHHR assumed no affirmative duty to act on behalf of Anissa Barbina and if no form of direct contact between the DHHR and Anissa Barbina or John Barbina took place, there necessarily could not have been any knowledge on the part of the DHHR that

was never recorded. Likewise, failure of the referral negates any assumption of a duty by the DHHR to act on behalf of Anissa Barbina. According to the Appellants' argument, the DHHR's intake system did fail Anissa, but only to the extent that Anissa occupied a role as a member of the general public.

The DHHR did not become aware until February 7, 2000, of the allegations of abuse to which Anissa Barbina had been subjected on Thanksgiving Day of 1999 (or the events of the summer of 1998). The Appellants cannot succeed on their claims for damages after that for two reasons: (1) the two incidents of abuse to which Anissa Barbina was subjected at the hands of her grandfather (the one reported in September, 1998, and the one that occurred on Thanksgiving Day of 1999) had already occurred by the time the DHHR was made aware of the alleged abuse on February 7, 2000, and no other incidents occurred thereafter; and (2) the fact that no additional incidents of abuse occurred after the DHHR was made aware of the prior abuse notwithstanding, the DHHR fulfilled all duties arising upon its receiving the report of abuse from John Barbina on February 7, 2000. As noted above, the February, 2000, referral was not a true Child Protective Services Referral because the alleged perpetrator did not reside in Anissa Barbina's home. See Exhibits A though E to the Motion for Summary Judgment of Defendant The West Virginia Department of Health and Human Resources (Record, page 465). Those exhibits establish the appropriateness of the activities undertaken by the DHHR upon learning of the abuse of Anissa Barbina. A service plan was created on February 10, 2000. An Initial Assessment of Safety Evaluation Worksheet and Conclusion reflects the investigation taken by Lori Glover, Child Protective Service Investigator, from February

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inaction on its part toward Anissa Barbina could lead to harm. Accordingly, a third element of the "special relationship" test is absent.

8, 2000, through February 22, 2000. This investigation included an interview with Anissa Barbina, with her mother, and with her cousin.

Exhibit B to the DHHR's Motion for Summary Judgment is a copy of a December 12, 2000, letter authored by Lori Glover and written to attorney Terri Tichenor (counsel for Mr. Barbina). In this letter, Ms. Glover summarizes her involvement in Anissa Barbina's case.

Exhibit C is a copy of a computer entry dated February 9 and February 10, 2000, reflecting that a report of "IA" [Initial Assessment] was being generated for the Multidisciplinary Investigative Team. A computer entry (Exhibit D) dated February 8, 2000, documents that a report on this matter was sent to the prosecutor and the sheriff of Taylor County, West Virginia.

Exhibit E is a copy of "Family Options Initiative Second Level Track C Provider Form," showing that a referral was made by the DHHR on March 3, 2000, to Together in Recovery for case management and coordination of services in the Anissa Barbina case.

The Appellants criticize the process that took place after the DHHR's courtesy interviews and transmittal of information to the prosecutor and sheriff of Taylor County. The impotence of such criticism notwithstanding (given that no incidents of abuse occurred after the DHHR was contacted in February, 2000), the DHHR cannot be deemed responsible for any deficiencies in that process. The DHHR performed the duties with which it was charged upon a report of sexual abuse by an out-of-home perpetrator. It has presented evidence that it communicated the results of its courtesy interviews to the appropriate law enforcement personnel. If, after the communication of that information, the process was not unimpeded, the problems with the process were caused by other parties and not by the DHHR. Furthermore, even if it be assumed for the sake of this argument (and for no other purpose) that the DHHR's handling of this matter subsequent to February 7, 2000, was

inappropriate in any manner, what is being discussed is an alleged flaw in the DHHR's system; this represents a breach of a general duty to the public and not to any particular person.

Reference to cases cited by this Court dealing with the Public Duty Doctrine and the special relationship thereto is beneficial in appreciating the absence of facts to support any contact between the DHHR and the plaintiffs and/or the assumption by the DHHR of any affirmative duty to act on behalf of the plaintiff.

In Parkulo v. West Virginia Board of Probation, *supra*, this Court found, in applying the Public Duty Doctrine to the conduct of the defendants West Virginia Board of Probation and Parole and the West Virginia Division of Corrections, that nothing in the record disclosed any special relationship between the appellant and appellees when the facts alleged were measured against the test adopted for the application of the exception. The facts underlying the Parkulo case were as follows: on February 9, 1992, the appellant Chandra Parkulo was walking across the campus of Marshall University. She was hit and knocked to the ground by a vehicle driven by Emmitt McCrary, Jr., a convicted criminal who had been released from prison. McCrary hit Parkulo in the head with a blunt object, dragged her into his vehicle, drove from the scene, and sexually assaulted and raped her. McCrary was later arrested and sentenced for the crimes he committed against Parkulo, and he subsequently died in prison. The appellant alleged that at the time he committed those crimes, he was under parole supervision by the West Virginia Division of Corrections and had been released from prison by the West Virginia Board of Probation and Parole. The complaint against the defendants alleged that the defendants violated their statutory duties in granting parole to McCrary and in supervising him while he was on parole.

The Court (reaching the conclusion that no special relationship existed between the appellant

and appellees) noted that while both entities may have been informed of the criminal record or tendencies of McCrary, the complaint contained no allegation directly asserting such knowledge. There was no allegation or evidence that the appellant had direct contact with either defendant regarding McCrary's release, supervision or conduct prior to his attack upon the appellant, nor was there any allegation or evidence suggesting that the appellant relied on any affirmative undertaking to act on behalf of the appellant.

In this case, the DHHR was not informed about Anissa Barbina's plight even to the extent that the defendants in the Parkulo case were about McCrary's background and tendencies. While the Parkulo defendants necessarily must be charged with information concerning McCrary's criminal record and tendencies, the DHHR did not even know of Anissa Barbina's existence until February, 2000 (about a year and a half after the 1998 incident and over two months after the 1999 incident).

In assessing the propriety of the lower court's granting of the defendants' motion to dismiss in Randall v. Fairmont City Police Department, *supra*, this Court found that the complaint sufficiently alleged the existence of the four factors necessary to establish a special relationship exception to the Public Duty Doctrine. In the Randall case, Sandra Johnson made telephone calls on four days in June, July and August, 1988, to the City of Fairmont police department informing the police that Zachary Curtis Lewis had harassed and threatened her and that she feared for her safety and life. During this same period of time, Mr. Lewis had on one occasion physically injured Ms. Johnson to the extent that she required hospitalization.

Prior to August 15, 1988, Mr. Lewis was to appear at a judicial proceeding in Marion County on criminal charges; he failed to appear. A warrant was issued for his arrest. Despite the fact that an arrest warrant was outstanding for Mr. Lewis and the fact that Ms. Johnson had made numerous

telephone calls to the police reporting threats by Mr. Lewis, the police took no action to apprehend and arrest Mr. Lewis.

On August 15, 1988, Ms. Johnson was driving her car in Fairmont and noticed that Mr. Lewis was following her in his car. In fear, she drove to the city police department and parked her car directly beside the city police department building on the city police department's parking lot. She blew her horn several times in an unsuccessful attempt to get the attention of the police inside the police building. While she was still in the car, Mr. Lewis shot and killed her.

The contact between Sandra Johnson and the police in the Randall case is in stark contrast to the dearth of contact between the DHHR and Anissa Barbina in this case. Sandra Johnson made numerous telephone calls to the police department advising the police that she was being harassed and threatened and that she feared for her life. She was physically injured by Zachary Lewis and hospitalized as a result of that injury. A warrant was issued for Mr. Lewis' arrest, but the police took no action to arrest him. Most significantly, when directly threatened by Mr. Lewis, Ms. Johnson sought sanctuary within the borders of the city police department and honked the horn in an attempt to get help. These actions quite naturally elevated Sandra Johnson from an anonymous member of the public to whom the police owed a general duty to an individual in a special relationship with the police department. None of these factors or factors similar to them is present in this case. The appellants offer no evidence whatsoever that a contact between Anissa Barbina and the DHHR was ever achieved.

The lack of contact between the DHHR and Anissa Barbina is emphasized in a case cited in the Randall decision: Jones v. County of Herkimer, 51 Misc.2d 130, 272 N.Y.S.2d 925 (Sup.Ct. 1966). In that case, an individual physically and emotionally harassed and threatened the decedent

for about three and one-half years, and the police departments of the two defendant municipalities were notified on numerous occasions of the harassment and threats. In addition, the final threat to the decedent's life had been communicated to the acting police chief of one of the defendant municipalities on the date the decedent was fatally shot. Finally, the decedent had sought protection, immediately prior to her death, in an office of one of the defendant municipalities. The court denied the defendants' respective motions to dismiss for failure to state a claim and for summary judgment, holding that the complaint sufficiently alleged a special relationship and presented triable issues of fact on that claim. Again, a comparison of the facts in the Jones case with the facts in this case points up the absence of contact between the DHHR and Anissa Barbina.

In Wolfe v. City of Wheeling, *supra*, the Court stated (citing Cuffy v. City of New York, 505 N.E.2d 937 (N.Y. 1987)): "The element of direct contact is conceptually related to the element of reliance and is a corollary of the need to show a "special relationship" between the plaintiffs and the local governmental entity beyond the relationship with the government that all citizens should bear in common. In addition, the requirement of direct contact serves as a basis for rationally limiting the class of individuals to whom the local governmental entity's "special" duty extends."

The DHHR recognizes that the cases dealing with the Public Duty Doctrine and the special relationship exception thereto have noted that the applicability of a special relationship exception to the Doctrine is *often* or *ordinarily* a question of fact (Parkulo, *supra*) (emphasis added). This Court has not held absolutely that determination of the special relationship exception is a question of fact. Furthermore, this Court has validated lower courts' findings as a matter of law that a special relationship does not exist.

For example, as noted above, the lower court in Parkulo found that the Public Duty Doctrine

applied to the defendants and that nothing in the record disclosed any special relationship between the parties. This Court agreed.

In Holsten v. Massey, *supra*, the Court again declined to defer a determination of a special relationship to the trier of fact, affirming summary judgment in favor of the defendants on the ground that there was no evidence in the record that the defendant assumed an affirmative duty to protect the plaintiff's decedent; that the defendant knew that the plaintiff's decedent would be harmed by a third-party; that the defendant had any contact with the plaintiff's decedent prior to her death; or that the decedent justifiably relied on the defendant to protect her from the third-party.

In this case, the lower court correctly found as a matter of law that the elements necessary to the establishment of the special relationship did not exist. The court's assessment did not involve the necessity of weighing facts, which might fairly be characterized as a jury's function. The court merely recognized the complete absence of evidence establishing the assumption of an affirmative duty by the DHHR and any direct contact by the DHHR. This evidentiary void deprives the appellants' argument of any genuine issue of material fact.

The essence of the inquiry the court must make [on a motion for summary judgment] is whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law. Williams v. Precision Coil, Inc., 459 S.E.2d 329 (W.Va. 1995). In this case, the evidence of contact between the DHHR and the appellants and an affirmative assumption of duty by the DHHR to Anissa Barbina is nonexistent, making this a one-sided issue to the extent that the DHHR must prevail as a matter of law.

The Circuit Court of Taylor County, West Virginia, Correctly Applied This Court's Holding in the Case of Arbaugh v. Board of Education, 591 S.E.2d 235 (W.Va. 2003)

The appellants' argument on this assignment of error is that the lower court should have applied Arbaugh v. Board of Education, 591 S.E.2d 235 (W.Va. 2003) in a manner contrary to and contradictory of the holding in that case.

The Arbaugh case held that West Virginia Code 49-6A-2 (the Child Abuse Reporting Statute) does not give rise to an implied private civil cause of action, in addition to criminal penalties imposed by the statute, for failure to report suspected child abuse, where an individual with a duty to report under the statute is alleged to have had reasonable cause to suspect that a child is being abused and has failed to report suspected abuse.

The appellants rely on dicta in the Arbaugh opinion (found at page 241), in which the court stated: "In so holding, we have not ignored Arbaugh's plea to carve out a private cause of action for more egregious situations, such as where an eye-witness has failed to report. Despite the underlying merit to this request, we are bound to refrain from making such policy determinations since " '[i]t is not the province of the courts to make or supervise legislation, and a statute may not, under the guise of interpretation, be modified, revised, amended, distorted, remodeled, or rewritten [.]' " (citations omitted). We note that children harmed by such egregious circumstances are not without remedy, where in an otherwise proper case a cause of action may be brought based on negligence with the failure to report admissible as evidence in that context."

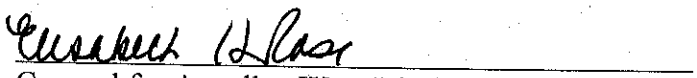
The appellants cannot seriously compare a situation involving an eye-witness to child abuse who fails to report with the circumstances described in this case (namely, that an alleged report of child abuse was not properly imputted into the DHHR's system). There is no evidence whatsoever

in the record to support a conclusion that the acts or failures to act on the part of the DHHR go to a level that can be described as egregious. Furthermore, even if it be assumed for the sake of this argument that the DHHR's conduct could somehow be construed as egregious, the portion of the Arbaugh decision relied upon by the Appellants can be looked to for prospective application only.

CONCLUSION

The Circuit Court of Taylor County, West Virginia, appropriately awarded summary judgment to the Department of Health and Human Resources. The Circuit Court of Taylor County correctly concluded that no "special relationship" to the Public Duty Doctrine exists which would deprive the DHHR of its exemption from liability. The Circuit Court also correctly applied the holding in Arbaugh, *supra*, in this matter. Accordingly, the summary judgment entered by the Circuit Court of Taylor County, West Virginia, should be affirmed. This defendant respectfully requests that such an affirmation be issued by this Honorable Court.

Respectfully submitted this 29th day of August, 2006,



Counsel for Appellee West Virginia Department
of Health and Human Resources

Elisabeth H. Rose
ROSE PADDEN & PETTY, L.C.
Attorneys at Law
612 WesBanco Building
Post Office Box 1307
Fairmont, West Virginia 26555-1307
(304) 363-4260
State Bar I.D. No. 3178

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of August, 2006, I served the foregoing **"Brief of Appellee The West Virginia Department of Health and Human Resources"** upon the Appellants by mailing true copies thereof by United States mail, postage prepaid, to the following counsel of record:

LaVerne Sweeney
215 West Main Street
Grafton, WV 26354
Counsel for Appellants

Gary S. Wigal
Brent Van Deysen
Gianola, Barnum & Wigal
1714 Mileground
Morgantown, WV 26505
Counsel for Appellees
Charles Curry and Kelly A. Curry

Boyd L. Warner
Waters, Warner & Harris, PLLC
701 Goff Building
P.O. Box 1716
Clarksburg, WV 26302-1716
Counsel for Appellee Clark Sinclair

Tamara J. DeFazio
Pullin, Fowler & Flanagan, PLLC
1200 Dorsey Avenue
Morgantown, WV 26501
Counsel for Appellee Valley Comprehensive
Community Mental Health Center, Inc.

Counsel for Appellee West Virginia Department
of Health and Human Resources

Elisabeth H. Rose
ROSE PADDEN & PETTY, L.C.
Attorneys at Law
612 WesBanco Building
Post Office Box 1307
Fairmont, West Virginia 26555-1307
(304) 363-4260
State Bar I.D. No. 3178